

No. 2029

**UNITED STATES CIRCUIT COURT OF APPEALS**

FOR THE NINTH CIRCUIT.

THE PACIFIC LIVE STOCK COMPANY (a Corporation),  
Appellant,

vs.

THE SILVIES RIVER IRRIGATION COMPANY (a  
Corporation), and HARNEY VALLEY IMPROVE-  
MENT COMPANY (a Corporation),  
Appellees.

**TRANSCRIPT OF RECORD.**

Upon Appeal from the United States Circuit Court  
for the District of Oregon.

FILED  
SEP 29 1917



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

PACIFIC LIVE STOCK COMPANY,  
Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY  
et al.,

Appellees.

**Names and Addresses of Attorneys of Record.**

EDWARD F. TREADWELL, San Francisco, California, and TEAL & MINOR, Spalding Building, Portland, Oregon, for Appellant.

WILLIAMS, WOOD & LINTHICUM, Spalding Building, Portland, Oregon, and LIONEL R. WEBSTER, Beck Building, Portland, Oregon, for Appellees.

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**Citation on Appeal [Original].**

United States of America,  
District of Oregon,—ss.

To Silvies River Irrigation Company, a Corporation,  
and Harney Valley Improvement Company, a  
Corporation, Greeting:

Whereas, Pacific Live Stock Company, a Corporation has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished

to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 31st day of July, in the year of our Lord, one thousand nine hundred and eleven.

R. S. BEAN,  
Judge.

Service of the within Citation on Appeal duly acknowledged this 4th day of August, 1911.

LIONEL R. WEBSTER,  
Solicitors for Silvies River Irrigation Company and  
Harney Valley Improvement Co. [1\*]

[Endorsed]: No. ——. United States Circuit Court, District of Oregon. Pacific Live Stock Company vs. Silvies River Irrigation Company and Harney Valley Improvement Company. Citation on Appeal. Filed August 4, 1911. G. H. Marsh, Clerk. By ————, Deputy Clerk.

*In the Circuit Court of the United States for the  
District of Oregon.*

October Term, 1907.

BE IT REMEMBERED, That on the 29th day of March, 1908, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[2]

\* Page-number appearing at foot of page of original certified Record.



*In the Circuit Court of the United States for the  
District of Oregon.*

IN EQUITY.

PACIFIC LIVE STOCK COMPANY (a Corpora-  
tion),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a  
Corporation), and HARNEY VALLEY IM-  
PROVEMENT COMPANY (a Corpora-  
tion),

Defendants.

**Bill of Complaint.**

To the Judges of the Circuit Court of the United  
States for the District of Oregon:

The Pacific Live Stock Company, a Corporation organized and existing under the laws of the State of California, and having its principal place of business at the City and County of San Francisco, State of California, and a citizen of the State of California, brings this its bill against Silvies River Irrigation Company, a corporation organized and existing under the laws of the State of Oregon, and having its principal place of business at Burns in the County of Harney, State of Oregon, and within the District of Oregon, and a Citizen of the State of Oregon, and against Harney Valley Improvement Company, a corporation organized and existing under the laws of the State of Oregon and having its principal place of business at Burns in said County of Harney, State

of Oregon, and within the District of Oregon, and a citizen of the State of Oregon, and thereupon your orator complains and says:

1. That your orator is, and ever since the 21st day of [3] January, 1888, has been, a corporation organized and existing under the laws of the State of California and has its principal place of business at the City and County of San Francisco in the State of California, and is a citizen of the State of California; that the purposes for which your orator was incorporated and the business in which it has been and is now engaged, are the buying, selling, raising, grazing and otherwise dealing in and with cattle, sheep, horses and all other kinds of livestock; the purchasing, leasing, hiring and otherwise dealing in and with ranges and pastures for the use of the same; the buying, selling and leasing lands and other real estate; and the doing, performing and undertaking all and every other matter and thing necessary or proper to carry into effect the purposes above mentioned.

2. That the defendant Silvies River Irrigation Company is a corporation organized and existing under the laws of the State of Oregon, and has its principal place of business at Burns in the County of Harney in the State of Oregon and within said District of Oregon, and is a citizen of the State of Oregon.

3. That the defendant Harney Valley Improvement Company is a corporation organized and existing under the laws of the State of Oregon and has its

principal place of business at Burns, in the County of Harney in the State of Oregon and within said District of Oregon, and is a citizen of the State of Oregon.

4. That Silvies River is, and from time immemorial has been, a natural unnavigable stream of running water having its principal sources in Grant and Harney counties in the State of Oregon, and flows in a general southeasterly course through Harney Valley in said Harney County and through certain lands of your orator in said Harney Valley hereinafter described; that at a point in Section 20, Township 23 South, Range 31 East, Willamette [4] Meridian in said Harney Valley, said Silvies River divides into two principal forks or channels known as the East and West Forks of Silvies River; that said Harney Valley slopes gently in a southerly direction and is nearly level, and that on account of the gentle slope of said valley said Silvies River flows slowly through said Valley; that on and above the lands of your orator numerous sloughs, minor channels and swales put out from the main channel of said river and its said forks, and the waters of said river and its said forks, and of said sloughs, minor channels and swales naturally flow upon and through your orator's said lands; that the climate of said Harney Valley is dry and the soil is naturally arid except as it is watered by or from the said river, its forks, minor channels, sloughs and swales, and with water said soil will produce vegetation abundantly; that the character of the lands of your orator is such that they are not generally adapted to the raising of

grain, alfalfa or other artificial crops; that the principal vegetation growing on the lands of your orator consists of natural grasses, and said natural grasses are the most valuable crop which said lands are capable of producing; that said grasses when cut and cured make good hay, and when left standing are of great value for the pasturing of stock; that your orator is, and for more than ten years last past has been, the owner and in the possession of the following described lands situate in said Harney Valley in said County of Harney, State of Oregon, to wit:

All of sections 16 and 36, the SE.  $\frac{1}{4}$  of section 26, and the NE.  $\frac{1}{4}$  of section 34, all in Township 23 S. R. 31 E. W. M.; Lot 1 in section 1, the SE.  $\frac{1}{4}$  of section 2, lot 4 in section 4 and the S.  $\frac{1}{2}$  of section 4, the SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of section 7, the E.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  of section 10, the S.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  of section 11, lots 1, 2, 3, 5, and 6, and W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of section 12, [5] the SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of section 13, the S.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  of section 14, the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 15, all of section 16, the W.  $\frac{1}{2}$  of section 18 and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of section 18, the N.  $\frac{1}{2}$ , and N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of section 21, the E.  $\frac{1}{2}$  and the W.  $\frac{1}{2}$  of the W.  $\frac{1}{2}$  of section 22, the W.  $\frac{1}{2}$  of W.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of section 23, NW.  $\frac{1}{4}$  of section 24, all of section 25, the SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of section 26, the N.  $\frac{1}{2}$  of section 27, the NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 27, the NE.  $\frac{1}{4}$  of section 35, all of section 36,

all in Township 24, S. R. 31 E. W. M. The NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and lot 4 in section 7, the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of section 16, the NW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 17, the NE.  $\frac{1}{4}$  of section 19, the SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 21, lots 2, 3, and 4 and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of section 27, the NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and lots 3 and 4 of section 28, the S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of section 29, the S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of section 30, the E.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and lots 3 and 4 of section 31, all of sections 32 and 33, the SW.  $\frac{1}{4}$  of section 34, all in Township 24 S. R. 32 E. W. M. The S.  $\frac{1}{2}$ , S.  $\frac{1}{2}$  of N.  $\frac{1}{2}$  and lots 1, 2, 3, and 4 of section 1, all of section 2, 3, and 4, the W.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and lot 1 of section 5, the S.  $\frac{1}{2}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and lots 1, 2, 3, 4, and 5 of section 6, all of sections 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 23, the N.  $\frac{1}{2}$ , N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and lots 1, 2, 3, and 4 of section 24, the N.  $\frac{1}{2}$ , S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 8, the N.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of section 19, the N.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of section 20, the N.  $\frac{1}{2}$ , N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  and SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of section 21, the N.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of section 22, the NE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and lots 1 and 3 of section 26, all in Township 25 S. R. 32 E. W. M. The W.  $\frac{1}{2}$  and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of section 12, the S.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  of section 13, the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of section 13, the NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 24, all in Township 25, S. R. 31 E. W. M. All [6] of section 36, Township 23 S. R. 30 E. W. M. The W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , W.



$\frac{1}{2}$  of SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of section 12, the NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of section 13, all in Township 24 S. R. 30 S. W. M.

5. That during all of the times above mentioned, your orator has in every year raised and mowed and cured a large quantity of said natural grasses growing on said lands for hay, and has used the remainder of said natural grasses for pasture, for the sustenance and support of large numbers of cattle kept by your orator on said lands, and has watered said cattle on said lands, and your orator now uses said lands for the aforesaid purposes.

6. That all of said lands above described are riparian to and irrigable from said East and West Forks of said Silvies River and the various channels and waterways into and through which the waters of said river flow, and the waters of said streams naturally flow through, over and upon said lands thereby irrigating them and enabling your orator to produce said hay and pasturage thereon, besides supplying water for your orator's stock, and for all other purposes for which an owner of land bordering on a running stream has a right to use the waters thereof; that your orator and its grantors built and maintained, and your orator now maintains certain ditches, levees and other works on said lands for the purpose of controlling, regulating and utilizing the waters of said Silvies River so naturally supplied to said lands and said works are now being used by your orator on said lands for the aforesaid uses and purposes.

7. That your orator is entitled to the full, regular

and natural flow of the waters of said Silvies River and of said forks and channels thereof through and over its said lands above described at all times and at all stages of the flow of the waters therein, subject only to the vested rights of other riparian owners in said streams; that very often the flow of said waters is not sufficient in quantity for irrigation of said lands [7] of your orator; that the flow of said waters to and upon said land of your orator is at all times very beneficial to said lands and adds very greatly to the productiveness and fertility thereof, and gives said lands the greatest element of their value; that if the flow of said waters is taken away from said lands said lands will become arid and greatly diminished in value; that the annual rainfall on said lands is small in quantity; that said lands, unless irrigated otherwise than by the natural rainfall, will not produce sufficient vegetation and will not enable your orator to pasture its cattle thereon.

8. That during the spring months of every year there is a large increase in the volume of water flowing down said Silvies River, caused by the melting of the snow in the watershed of said river; that the annual increased flow of water coming down said river at such times has from time immemorial caused said river in the various channels thereof to overflow and to cover with said overflow a large portion of the lands of your orator for a limited period of time each year; that said waters so overflow on account of the slight slope of the lands in said Harney Valley; that the water causing and constituting such overflow has in each year brought large quantities of silt and

material to said lands from the mountains and ravines through which said river and its tributaries flow in their course to said lands of your orator, and deposit said silt and material on your orator's lands and thereby fertilized and enriched said lands and caused said lands annually to yield increased crops of grasses and feed for your orator's stock, and has largely increased the value of said lands; that without such overflowing said lands would have produced little or no feed or crops unless said lands were artificially irrigated; that during the lowest stages of the flow of the waters of said Silvies River and its various channels the waters thereof are confined to and flow within the banks of the same; that when the [8] flow of the waters of said river increases in each year as aforesaid, such increased flow thereof naturally flows over and covers the meadow-lands adjacent to the channels of said river; that said overflow waters, together with the waters confined within the banks of said channels of said river, flow in a definite southeasterly direction through said lands of your orator, and that when the volume of water flowing through said channels of said river diminishes in the summer months of each year, so much of the overflow waters as have not been consumed in irrigation gradually recede to and within the banks of the various channels and waterways of said river.

9. That the main channel of said Silvies River flows through the Northeast quarter of Section 36, Township 22 South, Range 30 East, Willamette Meridian; that said subdivision of land is a number of miles above the lands of your orator above de-



scribed, and also above the point where said main channel of said river divides into said East and West Forks; that in the month of October, 1907, the defendants entered upon said northeast quarter of said Section 36 and upon lands lying easterly thereof, and commenced the construction of a large ditch connecting with the channel of said river and running therefrom to lands lying many miles eastward of said river and not riparian to said river, or any channel thereof, for the purpose of diverting a large volume of the waters flowing in said river and carrying the same through said ditch to and upon said last-mentioned lands, and using said water thereon for the irrigation of said lands; that said ditch is intended to divert and convey, and will be used by said defendants unless restrained from so doing by your Honors, to divert and convey from said river a very large volume of the waters thereof to said last-mentioned lands for the irrigation thereof; that said ditch is designed by said defendants to be six feet deep, forty feet wide on the top and twenty-two feet wide on the bottom, and to have a grade of four feet to the mile; that said lands to which said defendants intend to convey [9] said water by means of said ditch are so situated that no part of said waters after being conveyed to said lands can be returned to said Silvies River, or to any channel thereof, or can flow down to said lands of your orator above described, or any thereof; that by the diversion of said water all of said water will be prevented from flowing down to or upon any of said lands of your orator and said waters will be wholly lost to your orator; that the

capacity of said ditch is intended to be such that the same will be sufficient to divert all of the waters of said Silvies River flowing at the head of said ditch after the spring flow of the waters of said river has subsided.

10. That the diversions of said water so intended to be made by said defendants are wholly without any right on the part of said defendants, or either of them; that neither of said defendants owns any lands riparian to said Silvies River, or any of its channels, or any lands which are entitled to be irrigated with any of the waters of said river, or any of the channels thereof; that said waters so intended to be diverted and withdrawn from said river by said defendants are part of the natural flow of said river and are waters which would, if not so diverted, naturally flow down said river and the channels and waterways thereof to, along, through and over said lands of your orator.

11. That by such diversions of said waters by the defendants your orator will be deprived of the natural flow of said waters of said river to, along, through and over your orator's said lands, and of the annual wetting, irrigation and fertilization of said lands, by said waters, as hereinabove set forth, and your orator will be deprived thereby of the valuable and increased crops, feed and pasture thereon which your orator has annually received and enjoyed on said lands by the natural annual overflow of the waters of said river, and said lands will be greatly deteriorated [10] in quality and greatly depreciated in value thereby.

12. That said defendants will continue and threaten to continue the construction, maintenance and use of said ditch as aforesaid, and will divert said waters of said Silvies River therefrom and carry the same to and use the same upon said non-riparian lands above referred to unless enjoined and restrained by your Honors from so doing; that the high spring flow of said Silvies River usually commences to run in the month of April in each year; that said defendants threaten to and will, unless restrained by your Honors from so doing, divert a large volume of the coming spring flow of said river through said ditch to and upon said non-riparian lands, whereby your orator will suffer great and irreparable injury.

13. That such diversion of the waters of said Silvies River by said defendants at any time during any of the stages of the flow thereof will cause great and irreparable damage and injury to your orator; that all of said water so threatened to be diverted, taken and used by said defendants is actually needed and used by your orator for the irrigation of its lands, for the production of crops, feed and pasture thereon for its stock, and for water for its stock, and for domestic use; that without said water said lands of your orator will not be supplied with water sufficient for the production of crops, feed and pasture thereon, or for the watering of your orator's stock, or for your orator's domestic use; that if said waters are diverted by said defendants the crops on said lands will dry up and be destroyed and your orator will not receive the water

which it is entitled to receive and use as a riparian proprietor owning lands on the channels of said Silvie's River for the irrigation of its lands, and for such other purposes as a riparian owner is entitled to use the same; that it will be impossible to estimate the value of the crops, feed and pasture of which your orator will be deprived, or of the amount of the decrease in the [11] value of your orator's lands which will result from said diversions so intended and threatened to be made by said defendants.

14. That the matter in dispute herein, to wit, the aforesaid rights of your orator so threatened to be infringed by said defendants, exceeds, exclusive of interest and costs, the value of Two Thousand Dollars (\$2000).

AND COMPLAINANT ALLEGES that all of the said acts of said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and can have relief only in a court of equity where matters of this nature are properly cognizable and relievable, to the end therefore, that the complainant may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainant, and that the said defendants and each of them, their agents, servants and attorneys, and all persons acting in aid of them, or either of them, be perpetually enjoined

and restrained from diverting any water from said Silvies River, or any of its forks, channels or waterways thereof, at any place thereon above any of the lands of your orator, or in anywise obstructing the flow of said water to any place above any of the lands of your orator, and that they be compelled to fill up any excavations or openings made by them, or either of them, at or near the banks of said river, or any channel thereof, which will permit any water to flow out of said river, or any of its channels, which would not flow therefrom but for such excavations or openings, and that the complainant may be awarded judgment against said defendants for its costs and disbursements in this suit, and that it may have such further or other relief as the nature of the case may require [12] and to your Honors may seem meet.

May it please your Honors to grant unto the complainant a writ of subpoena to be directed to said defendants Silvies River Irrigation Company and Harney Valley Improvement Company, commanding them and each of them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order, directions and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining said defendants, and each of them, their agents, servants and at-



torneys, and all persons acting in aid of them, or either of them, during the pendency of this suit and until the further order of the Court, from diverting any water from said Silvies River, or any of the forks, channels or waterways thereof, at any place thereon above any of the lands of your orator, or in anywise obstructing the flow of said water at any place above any of the lands of your orator, and compelling them to fill up any excavations or openings made by them or either of them, at or near the banks of said river, or any channel thereof, which will permit any water to flow out of said river, or any of its channels, which would not flow therefrom but for such excavations or openings.

And may it further please your Honors to make and issue an order requiring the said defendants to show cause before this Honorable Court at a time and place therein fixed why such writ of injunction *pendente lite*, as above prayed for, should not be issued; and at the same time and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendants and each of them, their agents, servants and attorneys, and all persons acting in aid of them or either of them until the [13] hearing of such order to show cause and until the further order of this Court, from doing any

of the acts threatened to be done by them, as aforesaid.

PACIFIC LIVE STOCK COMPANY,  
Complainant.

By J. LEROY NICKEL,  
Its Vice-president.

[Seal]

And C. Z. MERRITT,  
Its Secretary.

WERT MINOR,  
ISAAC FROHAM,  
Solicitors for Complainant.

State of California,  
City and County of San Francisco,—ss.

J. Leroy Nickel, being duly sworn, deposes and says:

That he is the Vice-President of Pacific Live Stock Company, the corporation complainant above named, and that he makes this affidavit for and on its behalf; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 20th day of March, 1908.

JAMES MASON,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Filed in U. S. Circuit Court. March 29, 1908. J.  
A. Sladen, Clerk, District of Oregon. [14]

And afterwards, to wit, on the 15th day of June, 1908, there was duly filed in said court an Answer, in words and figures as follows, to wit:

[15]

*In the Circuit Court of the United States for the District of Oregon.*

IN EQUITY—No. 3276.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Respondents.

**Answer of Respondents.**

To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon:

Now comes the Silvies River Irrigation Company, a corporation, and Harney Valley Improvement Company, a corporation, the respondents herein, by George H. Williams, C. E. S. Wood, S. B. Linthicum, J. Couch Flanders, practicing as Williams, Wood & Linthicum, and Lionel R. Webster, their solicitors, and not confessing to the many errors and imperfections in the bill herein filed, hereby make answer under oath to so much of said bill as they are advised they ought to answer, and each for itself denies and alleges as follows:



Denies that Harney Valley slopes gently in a southerly direction, but alleges the truth to be that the general slope of that part of Harney Valley in which the waters of Sylvies River and the overflow and the flood waters thereof run is in an easterly and southerly direction, and denies that on and above the lands of the complainant numerous sloughs, minor channels and swales put out from the main channel of said river and its forks, or that the waters of said river and forks and slough or minor channels or swales, naturally flow upon and through complainant's lands. But alleges the truth to be that certain sloughs, minor channels and swales put out from the main channel of said river and its forks above the lands of the complainant [16] and on certain of complainant's lands, but not upon all of them, and that the waters of said river and of said forks, sloughs, minor channels and swales naturally flow through certain of complainant's lands, but not through all of them; and avers that about seven miles above the forks of Sylvies River, described in the bill as the east and west forks, another fork in the river puts out from the east bank thereof and flows easterly and southerly in a general direction; but somewhere in the general region of Section 23, Township 23 South, Range 31 East, W. M., there is a district practically entirely level where this branch of the river and in the same general region both the east and west forks of the river dissipate themselves and spread out into marshes and swampy country, and further on toward the south and east gather again into a channel; and the fork of the river above

described, which puts out from the river above diversions into the east and west forks, is known as Foley Slough until it reaches this level country and disappears into swales and swampy ground, and is known as Embree Slough below this point after it again becomes a channel. That this fork of the river known in its two divisions as Embree and Foley Slough flows in a general way parallel to the east fork of the river and re-enters the east fork of the river on the land of the complainant in about Section 24, Tp. 24, R. 32, and this branch of the river is an ancient and permanent channel of the river in which the water has always flowed at some time of the year and it carries in the spring floods of the year nearly as much water as Sylvies River itself.

That Sylvies River is fed by the melting snows and the spring rains and every season, save in exceptional seasons, at very long intervals, there are heavy spring floods and Sylvies River overflows its banks and the banks of its branches, and Foley Slough is filled and overflowing and during the period of heavy spring floods a great portion of the country adjacent to the river and its branches is so overflowed as to become a detriment, and this great excess of water forms the Malheur [17] Marshes and Malheur Lake in conjunction with other waters.

That if said flood water collects in too great a quantity for too long a time it forms marshes which grow only flags and tules of no value, and if it stands too deep upon the land it kills out the natural grasses and has a tendency to produce other vegetation in the nature of weeds, of no value.

Respondents have no knowledge or information sufficient to form a belief as to whether complainant for more than ten years last past has been and is now the owner of the lands described in the complaint, or of any part of said land, and therefore leave the complainant to make such proof thereof as it may be advised.

Respondents deny that all of the said lands described in the bill are riparian to or irrigable from the east and west forks of Sylvies River or the various channels or water-ways through which the waters of said river flow, and deny that all of said lands have any right to the waters of the east or west forks, or any channel of Sylvies River, by reason of any riparian ownership of said land in the complainant or its predecessors in interest, and deny that the waters of said streams naturally flow through, or over, or upon, all of said lands.

Deny that the complainant is entitled to the full, regular or natural flow of the waters of Sylvies River, or said forks or channels, over said lands at all times; but aver that in the spring of the year the natural flow in Sylvies River is much more than sufficient for the use of complainant on said land and much greater than any use to which complainant has ever put such full spring flow of the river, and is greater than any use which complainant can put said waters to on said land.

Deny that the flow of said waters to or upon said land is at all times very beneficial or adds to the productiveness thereof, but aver that at times the flow of water is so great as to be a detriment. [18]

Deny that the overflow waters each year have brought large quantities of silt or material to said lands or deposited said silt or materials on said lands, or fertilized or enriched said lands; or caused said lands to yield an increased crop of grasses or feed; but aver that the greater portion of any silt or matter in suspension in said flood waters is deposited close to the bank of the channels in said stream and on the upper portions of said streams before said streams have reached the lands of the complainant; and deny that any great quantity of silt and material is carried in said waters at all; and deny that it is of any value to the land over which said waters overflow.

Deny that all the lands of which respondents are constructing a ditch as described in the bill are not riparian, but aver that certain of said lands are riparian to the said Sylvies River and the channels thereof.

Deny that the diversion of the water intended to be made by respondents, as described in the bill, is without right, but aver that respondents, and each of them, have good and lawful right to divert the surplus and excess flood waters of Sylvies River through the ditch described in the bill by reason of appropriations of such surplus flood water heretofore made by respondents and each of them.

Deny that neither of the defendants own any land riparian to Sylvies River or any of its channels or lands entitled to be irrigated by the waters of said river or channels, but aver that the respondent the Harney Valley Improvement Company is the owner

of lands riparian to the branches and channels of Sylvies River, which lands are entitled to be irrigated by the waters of said river and channel.

Deny that by diversion of the waters described in the bill by the respondents, or either of them, the complainant will be deprived of any natural flow of water of said river to, through, or over complainant's said lands, or of the annual wetting or fertilization of said lands by said water; or deprived of any increased crops or feed or pasture which complainant has annually received or enjoyed on said lands by the natural overflow of said waters of said river; or that said [19] lands will be at all deteriorated or depreciated; but aver that no water to which complainant has any claim of right will be diverted by respondents, or either of them, but that respondents will, if permitted, divert only the surplus and excess flood water, and that complainant will receive all the water which it ever has received to its beneficial use or capable of beneficial use on said lands, and will not in any way be injured by the ditch and diversion of flood water contemplated by respondents.

Deny that respondents will divert any waters of said Sylvies River to which anyone has a vested right, but aver that they will divert only that excess spring flood water which now goes to waste and is a detriment.

Deny that complainant will suffer any injury if respondents be permitted to divert the excess spring flow of said river through said ditch upon said lands, and aver that the present spring flow is past and that respondents have not diverted any water at all, by



reason of the order of this Court restraining respondents from so doing.

Deny that the diversion of the waters of said Sylvies River by respondents at any time, or during any stages of the flow of water, will cause any damage or injury whatever to complainant, and deny that all of the water threatened to be diverted or used by respondents is actually needed or used by complainant for the irrigation of land or for the production of crops, or feed, or pasture, or stock water, or domestic use, and deny that without said water the lands of the complainant will not be supplied with water sufficient for the production of crops, feed, pasture, or watering of stock or domestic use, or that if said waters are diverted the crops on said lands will dry up and be destroyed; or that complainant will not receive the water which it is entitled to receive or use as riparian proprietor, as described in the bill; but aver that the complainant will receive notwithstanding the diversion of the water contemplated by respondents all of the water which complainant has heretofore taken and beneficially used [20] on the land belonging to the complainant described in the bill and all the water it is entitled to take and use on said land, and will not in any way be injured or damaged by any contemplated diversion of water by respondents.

Further answering unto said bill, and to each averment thereof, the respondents, each for itself, says, that it hereby disclaims any right or color of right, or intention, to take from Sylvies River, or any branch thereof, any water whatever to which anyone

had any vested right prior to the filing of the appropriation of waters in Sylvies River by the respondent Harney Valley Improvement Company, to wit:

which appropriation states in substance and effect that the respondent Harney Valley Improvement Company only claims to appropriate, or seek to appropriate, so much of the waters of Sylvies River as is not already appropriated by anyone, and the intention of respondents is that if permitted so to do they will carry off the surplus waters of Sylvies River to which no one has right or title and which go to waste and form, together with other water, the Malheur Marshes and Lake, and carry such water upon the arid sagebrush lands for the purpose of reclaiming the same, and respondents have not intended and do not now intend to take any water which anyone has put to a beneficial use at any time when such water is being put to a beneficial use; and respondents disclaim any intention to invade the legal rights of anyone as to any water of Sylvies River or any branches thereof, but only claim and intend to use such water as no one else is putting to a beneficial use, by putting such water to a beneficial use in reclaiming arid lands.

Respondents severally aver that they have made several and distinct appropriations of the surplus waters of Sylvies River not already claimed or appropriated or used by anyone, but they have agreed to and intend to co-operate together in one general irrigation plan for the redemption of certain arid lands to the east of Sylvies River in what is commonly and locally known as the desert, and each of

[21] them since the appropriation of said waters by them severally made has continuously and in good faith been prosecuting said plan for the redemption of said lands by said waters by actual construction of ditches and canals and the expenditure of large sums of money in surveys, and otherwise, and each of them has in all ways been diligent in making said appropriation effective.

And respondents, and each of them, aver that there is a great surplus of flood water and surplus water in Sylvies River, which up to the time of said respective appropriations had not been beneficially used by the complainant or by anyone and is not now beneficially used by anyone, but said excess water goes to waste, as aforesaid, and together with other waters forms the vast marshes and the great lake known as the Malheur Marshes and Malheur Lake.

The plan contemplated by respondents, and each of them, is to place such surplus water on the arid lands and thus effect a two-fold benefit by redeeming the desert lands and reclaiming to a great extent the said marshes, and if upon actual trial it shall prove that respondents, or either of them, deprive complainant, or anyone, of any water heretofore beneficially used by complainant or by anyone, then these respondents, and each of them, disclaims any right to such water so put to a beneficial and prior use by complainant or anyone and agrees so to modify its plan, or if necessary discontinue it altogether, so that the acts of respondents, or either of them, in the



*The Sylvies River Irrigation Company et al.* 27  
premises, may not or shall not conflict with the established rights of others.

SYLVIES RIVER IRRIGATION CO.

By C. E. S. WOOD,  
Att'y.

HARNEY VALLEY IMPROVEMENT COMPANY,

By DRAKE C. O'REILLY,  
Secy.,  
Respondents.

GEO. H. WILLIAMS,  
C. E. S. WOOD,  
S. B. LINTHICUM,  
J. C. FLANDERS,  
LIONEL R. WEBSTER,

Solicitors. [22]

United States of America,  
District of Oregon,—ss.

I, Drake C. O'Reilly, first being duly sworn, say that I am the secretary of the respondent, The Harney Valley Improvement Company, and have been such secretary since the time of its organization. That I have read over the foregoing answer and am personally familiar with the facts therein stated and that said answer is true.

DRAKE C. O'REILLY.

Subscribed and sworn to before me this 12th day of June, 1908.

[Seal]

ALBERT E. GEBHARDT,  
Notary Public in and for Oregon.

Due service of the within answer by certified copy,

as prescribed by law, is hereby admitted at Portland, Oregon, 12th June, 1908.

WIRT MINOR,  
Of Solicitors for Complainant.

Answer. Filed June 15, 1908. G. H. Marsh,  
Clerk. [23]

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And afterwards, to wit, on the 13th day of March, 1911, there was duly filed in said court, an Opinion, in words and figures as follows, to wit:  
[24]

[Opinion.]

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3,276.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION CO. (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

EDWARD F. TREADWELL, Attorney for  
Complainant.

WILLIAMS, WOOD & LINTHICUM, and  
LIONEL WEBSTER, for Defense.

BEAN, District Judge (Memorandum Decision).

This is a suit brought to restrain the defendant companies from diverting the waters of Silvies River for irrigating purposes. From the point where the

river debouches into the valley down to Malheur Lake, a distance of several miles, the land is comparatively level with but a slight fall towards the lake. Through this territory the river divides into numerous branches and forks. The channels are narrow and shallow and incapable of retaining any considerable portion of the water during the spring freshets, and the adjoining land is thereby naturally irrigated from the waters flowing out through the various sloughs and depressions and spreading over the surface of the country. The land is very productive when so irrigated and practically valueless without water. The defendant company plans to intercept the flow of the water near the head of the valley and divert it from the watershed to irrigate arid lands to the east. The complainant and other parties own large quantities of valuable land naturally irrigated from the river below the point of the defendant's proposed diversion, and the object [25] of this suit is to prevent such diversion. The defendants claim the right to take the surplus water only and disclaim any intention of interfering with the rights of any of the settlers. But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings, and which is annually irrigated by the overflow if undisturbed. Until it is adjudicated in some appropriate proceeding that there is a surplus of water and the quality thereof, I do not think the defendant should be permitted to interfere with the natural flow and

thus invite numerous lawsuits and controversies between it and the settlers.

Decree will therefore be entered as prayed for in the bill, but a provision may be inserted at the foot thereof, reserving the right to the defendants to apply for a vacation of the injunction if it should hereafter be determined that there is any surplus water subject to appropriation by it.

Opinion. Filed March 13, 1911. G. H. Marsh, Clerk. [26]

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And afterwards, to wit, on Friday, the 7th day of April, 1911, the same being the 160th judicial day of the regular October, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [27]

[Decree.]

*In the Circuit Court of the United States for the District of Oregon.*

No. 3,276.

April 7, 1911.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION CO. (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

This cause having heretofore come on for final hearing upon the pleadings filed herein on behalf of the respective parties and upon the testimony taken and reported to this Court, and having heretofore been presented by counsel for the respective parties and taken under advisement by the Court, the Court being now fully advised finds:

I.

The complainant, Pacific Live Stock Company, is a corporation organized under the laws of the State of California and a citizen of the State of California; the Silvies River Irrigation Company is a corporation organized under the laws of the State of Oregon and a citizen of the State of Oregon, and the Harney Valley Improvement Company is a corporation organized under the laws of the State of Oregon and a citizen of the State of Oregon.

II.

The Silvies River is, and from time immemorial has been, a natural and unnavigable stream of water having its principal sources in Grant and Harney Counties in the State of Oregon, and flows in a general southeasterly course through Harney Valley; and at a point in Section twenty (20), Township twenty-three (23) [28] south, Range 31 east of Willamette Meridian, said river divides into two principal forks or channels known as the East and West Forks of Silvies River. From the point where the river debouches into the valley down to Malheur Lake, a distance of several miles, the land is comparatively level with but a slight fall towards the lake and through this territory the river divides into

numerous branches and forks from which the waters of said river are used by complainant and others for the irrigation of land through which the same flow. Said land when so irrigated is very productive, but practically valueless without water.

### III.

In this territory the complainant, Pacific Live Stock Company, owns and is in possession of certain lands of the character above described and irrigated as above described from the waters of Silvies River and its several channels, sloughs and depressions which lands are described as follows:

All of Sections 16 and 36, the SE.  $\frac{1}{4}$  of Section 26 and the NE.  $\frac{1}{4}$  of Section 34, all in Township 23 south, Range 31 east W. M.; Lot 1 in Section 1, the SE.  $\frac{1}{4}$  of Section 2, Lot 4 in Section 4 and the S.  $\frac{1}{2}$  of Section 4, the SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of Section 7, the E.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  of Section 10, the S.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  of Section 11, Lots 1, 2, 3, 5, and 6, and W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Section 12, the SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Section 13, the S.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  of Section 14, the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Section 15, all of Section 16, the W.  $\frac{1}{2}$  of Section 18 and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Section 18, the N.  $\frac{1}{2}$ , and N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of Section 21, the E.  $\frac{1}{2}$  and the W.  $\frac{1}{2}$  of the W.  $\frac{1}{2}$  of Section 22, the W.  $\frac{1}{2}$  of W.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section 23, NW.  $\frac{1}{4}$  of Section 24, all of Section 25, the SE.  $\frac{1}{4}$ , [29] SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of Section 26,



the N.  $\frac{1}{2}$  of Section 27, the NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Section 27, the NE.  $\frac{1}{4}$  of Section 35, all of Section 36, all in Township 24 south, Range 31 east W. M.; the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and Lot 4 in Section 7, the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section 16, the NW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Section 17, the NE.  $\frac{1}{4}$  of Section 19, the SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Section 21, Lots 2, 3 and 4, and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section 27, the NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and Lots 3 and 4 of Section 28, the S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of Section 29, the S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of Section 30, the E.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and Lots 3 and 4 of Section 31, all of Sections 32 and 33, the SW.  $\frac{1}{4}$  of Section 34, all in Township 24 south, Range 32 east W. M.; the S.  $\frac{1}{2}$ , S.  $\frac{1}{2}$  of N.  $\frac{1}{2}$  and Lots 1, 2, 3, and 4 of Section 1, all of Sections 2, 3, and 4, the W.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and Lot 1 of Section 5, the S.  $\frac{1}{2}$ , S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and Lots 1, 2, 3, 4 and 5 of Section 6, all of Sections 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 23, the N.  $\frac{1}{2}$ , N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and Lots 1, 2, 3 and 4 of Section 24, the N.  $\frac{1}{2}$ , S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  of SE.  $\frac{1}{2}$  of Section 8, the N.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of Section 19, the N.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of Section 20, the N.  $\frac{1}{2}$ , N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  and SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section 21, the N.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of Section 22, the NE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and Lots 1 and 3 of Section 26, all in Township 25 South, Range 32 east W. M.; the W.  $\frac{1}{2}$  and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Section 12, the S.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  of Section 13, the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Section 13, the NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$

of NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Section 24, all in Township 25 south, Range 31 east W. M.; all of Section 36, Township 23 south, Range 30 east W. M.; the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Section 12, the NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Section 13, all in Township 24 south, Range 30 east W. M.

The complainant has for a number of years raised and mowed and cured a large quantity of natural grasses for hay and has used the remainder of said natural grasses for pasture for the sustenance and support of a large number of *cattel* and has watered [30] its cattle on said lands, and parties other than the complainant also own large quantities of valuable land so situated and irrigated upon the river.

#### IV.

The defendants about the month of October, 1907, entered upon the northeast quarter of Section 36 in Township 22 south, Range 30 east of the Willamette Meridian and upon the lands lying easterly thereof, and commenced the construction of a large ditch to connect with the channel of Silvies River and running from the channel of said river to lands lying many miles eastward of said river and nonriparian to said river or any channel thereof, for the purpose of diverting a large volume of the waters flowing in said river and carrying the same through said ditch and using the water so conducted for the irrigation of said lands and claim the right to take surplus water from said river, that is to say, water not required for irrigation of the complainant's lands and other lands now being irrigated by means of the



waters of said river as above stated, and disclaim any intention of interfering with the rights of the complainant or any of the settlers or land owners whose lands are irrigated by means of the waters of said river as above described.

V.

All of the water of Silvies River is necessary for the irrigation of the complainant's lands and the lands of others irrigated from the waters of said river as above described, and which are annually irrigated by the waters of said river if undisturbed, and by the diversion contemplated by the defendants of the water of Silvies River the complainant and others owning lands irrigated from said river as above described will be deprived of valuable feed and crops, their lands rendered less valuable, and the complainant will be greatly damaged and injured.

[31]

VI.

Unless the defendants be enjoined from perfecting their diversion and taking the waters of said river they will continue the construction and maintenance of their ditch and by means thereof will divert waters of said river and will carry the same to and use the same upon nonriparian lands not now naturally irrigated by the waters of said river, and divert a large volume of the waters of said river through said ditch and deprive the complainant and others owning lands naturally irrigated from said stream of the use and enjoyment of the waters of said stream, and such diversion of the waters of said river by the defendants and the deprivation of the complainant of the use and

enjoyment of said rivers will cause great and irreparable damage and injury to the complainant.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that Silvies River Irrigation Company, a corporation organized under the laws of the State of Oregon, and Harney Valley Improvement Company, a corporation organized under the laws of the State of Oregon, and the officers, agents, servants, employees and attorneys of said corporations, and of each of said corporations, and all other persons acting under the authority of said corporations or of either of said corporations, be and they are and each of them be and is hereby strictly enjoined and inhibited from constructing and maintaining said or any ditch to divert waters from Silvies River, and from diverting any of the waters from Silvies River by means of said ditch or otherwise from the lands of the complainant or from interfering with the natural flow of the waters of said river, and he and they are, and each of them is, perpetually enjoined and restrained from diverting any water from any of the forks, channels or waterways of Silvies River at any place thereon above any of the lands of the complainant and from in anywise obstructing the flow of said water of said river and [32] of its forks, channels and waterways at any place above the lands of the complainant above described, and that they be, and each of them is, hereby commanded to fill up any excavations or openings made by them or by either or any of them at or near the banks of Silvies River and any excavations or openings made by them or any or either of them at or

near any channel of Silvies River which will permit any water to flow out of said river or out of any of its channels which would not flow therefrom but for such excavations or openings.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the complainant have and recover of and from the defendants its costs and disbursements in this suit.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that there be reserved to the defendants above named and to each of them the right to apply to this Court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them or by either or any of them.

Done and dated in open court, this 7th day of April, 1911.

R. S. BEAN,  
Judge.

Final Decree. Filed April 7, 1911. G. H. Marsh,  
Clerk. [33]

And afterwards, to wit, on the 31st day of July, 1911, there was duly filed in said court, a Petition for Appeal, in words and figures as follows, to wit:  
[34]

*In the Circuit Court of the United States for the District of Oregon.*

No. —.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

**Petition for Appeal.**

To the Honorable the Circuit Court of the United States for the District of Oregon.

The above-named complainant in the above-entitled cause, Pacific Live Stock Company (a corporation), conceiving itself aggrieved by that part of the final decree heretofore made and entered in the above-entitled cause, which reads as follows, to wit:

“It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and to each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should hereafter

be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them, or by either or any of them.”

desires to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that part of said judgment and decree, and respectfully petitions this court for an order allowing the said complainant to prosecute an appeal to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit from that part of said decree; and that the said court also make an order fixing the amount of security which [35] the said appellant shall give and furnish upon said appeal, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

EDWARD F. TREADWELL,  
WIRT MINOR,

Solicitors for Complainant.

Petition for Appeal. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon.

[36]

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And afterwards, to wit, on the 31st day of July, 1911, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to wit: [37]

*In the Circuit Court of the United States for the  
District of Oregon.*

No. —

PACIFIC LIVE STOCK COMPANY (a Corpora-  
tion),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a  
Corporation), and HARNEY VALLEY IM-  
PROVEMENT COMPANY (a Corpora-  
tion),

Defendants.

### **Assignment of Errors.**

Comes now the complainant in the above-entitled cause and files the following assignment of errors upon which it will rely upon its appeal from that part of the final decree heretofore rendered in said cause, and which reads as follows:

“It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and to each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them, or by either or any of them.”

1. That the Court erred in reserving to the defendants the right to apply to the Court for the vacation of final injunction in said suit.

2. The Court erred in reserving to the said de-



fendants the right to litigate in any proceeding the question as to the existence of any surplus water subject to appropriation by them, or either of them.

[38]

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays a reversal of that part of the final decree herein which is above referred to.

EDWARD F. TREADWELL,

WIRT MINOR,

Solicitors for Complainant.

Assignment of Errors. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. [39]

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And afterwards, to wit, on Monday, the 21st day of July, 1911, the same being the 95th judicial day of the regular April, 1911, term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [40]

**[Order Allowing Appeal, etc.]**

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3276.

PACIFIC LIVE STOCK COMPANY (a Corpora-  
tion),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a  
Corporation), and HARNEY VALLEY IM-  
PROVEMENT COMPANY (a Corpora-  
tion),

Defendants.

At a stated term, to wit, the April term, 1911, of the Circuit Court of the United States of America, of the Ninth Circuit, in and for the District of Oregon, held at the courtroom in the city of Portland on the 31st day of July, 1911—Present, Hon. R. S. Bean, District Judge.

On reading and filing the petition of complainant herein for an order allowing an appeal from that part of the final decree herein, which reads as follows, to wit:

“It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and to each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding

that there is any surplus water subject to appropriation by them, or by either or any of them.” and the filing herein of the assignment of errors relied upon and an undertaking on appeal, duly approved by the Court, it is ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the portion of the final decree hereinabove referred to be, and the same is hereby allowed, and that a transcript of the record be forthwith transmitted to [41] the said United States Circuit Court of Appeals for the Ninth Circuit, said record to consist of the pleadings and final decree in said cause and said petition for appeal, assignment of errors, undertaking on appeal, order allowing appeal, citation on appeal; and the said bond on appeal is hereby approved.

Done in open court this 31 day of July, 1911.

R. S. BEAN,  
District Judge.

Order. Filed July 31, 1911. G. H. Marsh, Clerk  
U. S. Circuit Court, District of Oregon. [42]

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And afterwards, to wit, on the 31st day of July, 1911,  
there was duly filed in said court, a Bond on  
Appeal, in words and figures as follows, to wit:  
[43]

[Bond.]

*In the Circuit Court of the United States for the  
District of Oregon.*

Portland, Ore. No. 43,116.

Hartman & Thompson, Gen. Agts.

No. —.

PACIFIC LIVE STOCK COMPANY (a Corpora-  
tion),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a  
Corporation), and HARNEY VALLEY IM-  
PROVEMENT COMPANY (a Corporation),  
Defendants.

KNOW ALL MEN BY THESE PRESENTS,  
that we, PACIFIC LIVE STOCK COMPANY (a  
corporation), as principal, and THE UNITED  
STATES FIDELITY AND GUARANTY COM-  
PANY, of Baltimore, Maryland, as sureties, are held  
and firmly bound unto Silvies River Irrigation Com-  
pany (a corporation) and Harney Valley Improve-  
ment Company (a corporation) in the full and just  
sum of Five Hundred (500) Dollars, to be paid to  
the said Silvies River Irrigation Company and  
Harney Valley Improvement Company, their suc-  
cessors and assigns, to which payment, well and truly  
to be made, we bind ourselves, our heirs, executors  
and administrators, jointly and severally, firmly by  
these presents. Sealed with our seals and dated this  
31<sup>st</sup> day of July, 1911.

Whereas the Pacific Live Stock Company is about to petition the Circuit Court of the United States for the Ninth Circuit, District of Oregon, to grant an appeal from a certain part of the final decree entered by the said court in an action therein pending, entitled Pacific Live Stock Company (a corporation), Complainant, vs. Silvies River Irrigation Company (a corporation), and Harney Valley Improvement Company (a Corporation), Defendants; [44]

Now, the condition of the above obligation is such, that if the said Pacific Live Stock Company shall prosecute the said appeal to effect, and if it fails to make its plea good, shall answer all costs which may be awarded against it, then the obligation to be void; otherwise to remain in full force and virtue.

PAVIFIC LIVE STOCK COMPANY,

By J. LEROY NICKEL, [Seal]

Vice-President.

By C. Z. MERRITT,

Secretary.

THE UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

By J. L. HARTMAN,

Its Attorney in Fact.

Countersigned by

HARTMAN & THOMPSON, [Seal]

General Agents.

The foregoing bond is hereby approved, this 31st day of July, 1911.

R. S. BEAN,  
District Judge.

Bond on Appeal. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. [45]

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**[Certificate of Clerk U. S. Circuit Court to Record.]**

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing order allowing the appeal of the Pacific Live Stock Company from the final decree of said Court entered in the case of the Pacific Live Stock Company against the Silvies River Irrigation Company and the Harney Valley Improvement Company, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain the original citation in said cause, and a true and complete transcript of the pleadings, opinion, final decree, petition for appeal, assignment of errors, undertaking on appeal, and order allowing appeal in said cause, being all of the record designated by said order allowing appeal to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is twenty-seven 00/100 dollars, and that the same has been paid by said appellant.



In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 26th day of August, A. D. 1911.

[Seal]

G. H. MARSH,

Clerk.

By J. W. Marsh,

Deputy. [46]

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[Endorsed]: No. 2029. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Live Stock Company (a Corporation), Appellant, vs. The Silvies River Irrigation Company (a Corporation), and Harney Valley Improvement Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court of the District of Oregon.

Filed August 30, 1911.

FRANK D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

